Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

CREIGHTON E. MILLER, Administrator of the Estate of Matthew Williams, Deceased,

Petitioner,

v.

ARCO MARINE, INC.; ATLANTIC RICHFIELD COMPANY; CHEVRON U.S.A., INC.; UNOCAL CORPORATION; NATIONAL BULK CARRIERS, INC.,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of Alabama

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Did the Alabama Supreme Court err in applying a strict common-law causation standard to medical evidence proffered in a Jones Act case?

PARTIES TO THE PROCEEDING

All Parties appear in the caption of the case on the cover page.

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PETITION FOR WRIT OF CERTIORARI

Creighton E. Miller, Administrator of the Estate of Matthew Williams, respectfully petitions for a writ of certiorari to review the judgment of the Alabama Supreme Court in this case.

OPINIONS AND ORDERS

The opinion of the Alabama Supreme Court affirming the Alabama Circuit Court for the County of Mobile's grant of summary judgment in favor of Defendant-Respondents appears at Appendix 1 to the petition and has been designated for publication but is not yet reported. *Miller v. National Bulk Carriers, Inc.*, No. 1981819, 2000 WL 264230 (Ala. Mar. 10, 2000).

The opinion of the Alabama Circuit Court for the County of Mobile clarifying its docket entry granting summary judgment in favor of Defendant-Respondents appears at Appendix 10 to the petition and is unpublished.

The docket entry of the Alabama Circuit Court for the County of Mobile granting summary judgment in favor of Defendant-Respondents appears in full in footnote two on page four of the petition and is unpublished.

STATEMENT OF JURISDICTION

The date on which the Alabama Supreme Court decided this case was March 10, 2000. A copy of that decision appears at Appendix 1.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

STATUTORY PROVISION INVOLVED

The Jones Act, 46 U.S.C. App. § 688.

STATEMENT OF THE CASE

Matthew Williams was a merchant mariner who sailed primarily aboard tanker vessels. In a career spanning the years 1945 to 1981, he sailed aboard vessels owned and operated by the several Shipowner-Defendants. Those vessels carried benzene and benzene-containing products (for instance, petroleum products). In *United Steelworkers of America v. Rubber Manufacturers Association*, 783 F.2d 1117 (D.C. Cir. 1986), the court observed that "Benzene is a clear, colorless, flammable liquid employed in various industrial processes. It is undisputed that benzene poses significant health risks." The toxicity of benzene is sufficiently notorious that judicial notice has been taken thereof. *Pantry, Inc. v. Stop-N-Go Foods, Inc.*, 796 F. Supp. 1164, 1168 (S.D. Ind. 1992) (taking judicial notice of EPA document which "states firmly that benzene is believed to be a carcinogen in *any* concentration.").

As part and parcel of his shipboard duties, Defendants required Williams to perform tasks which entailed exposure to benzene and other toxins. As a consequence of this shipboard exposure, Matthew Williams developed a cancer of the blood-forming organs known as multiple myeloma, from which he died on March 30, 1994.

Following Williams's death, the Administrator of Williams's estate brought suit in the Alabama Circuit Court for Mobile County, claiming against the defendants under the Jones Act, 46 U.S.C. App. § 688, and the general admiralty and maritime law. The Defendants fell into two distinct categories: the Manufacturer-Defendants who produced and supplied the benzene and benzene-containing products and the Shipowner-Defendants who owned or operated the ships transporting the benzene and benzene-containing products. During the pretrial proceedings, numerous Defendants were dismissed. Shortly before the scheduled jury trial, the remaining Defendants[1] – all shipowners – moved for summary judgment dismissing the Second Amended Complaint, claiming: (1) that Plaintiff did not possess sufficient evidence of Williams's exposure to benzene to withstand summary judgment; (2) that the opinions of Plaintiff's expert witnesses were inadmissible under the "general acceptance" rule of *Frye v. United States*, 54 App. D.C. 46, 293 F. 1013 (D.C. Cir. 1923) as applied under Alabama law. *See Ex*

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[1] The remaining Defendants, Respondents herein, are Arco Marine, Inc., Atlantic Richfield Company, Chevron U.S.A., Inc., Unocal Corporation and National Bulk Carriers, Inc.

Parte Perry, 586 So. 2d 242 (Ala. 1991) (adopting the *Frye* standard for Alabama courts). Without holding a *Frye* hearing, the trial court, Hon. Edward B. McDermott, excluded Plaintiff's proffered expert testimony *in toto*, and granted summary judgment. On June 4, 1999, the trial court issued a terse docket entry granting the motion for summary judgment.[2]

Plaintiff timely appealed to the Alabama Supreme Court. On August 20, 1999 (well after the appeal was filed and, indeed, as the appellate record was being transmitted), the trial court issued an order explaining its ruling of June 4, 1999. The August 20 order states in part, "On June 4, 1999, this Court granted Defendants' Motion for Summary Judgment, finding that plaintiff had failed to present substantial evidence that decedent experienced significant exposure to benzene." App. 10.

Following briefing, but without the benefit of oral argument, the Alabama Supreme Court affirmed the circuit court's grant of summary judgment in favor of the remaining Shipowner-Defendants. App. 6. The Alabama Supreme Court agreed that summary judgment was appropriate because there was no "substantial evidence" of "substantial exposure" of Williams to benzene. App. 5-6. The court conceded that Plaintiff produced evidence

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[2] "June 4, 1999 – By order of Court defts motion for summary judgment is granted, cause dismissed, costs taxed to pltff."

of Williams's exposure,[3] but applied a strict causation standard which the court held that Plaintiff did not meet. App. 5-6. Because the court held the evidence insufficient, and because Plaintiff's experts based their opinions upon this evidence, the court held further that the testimony of Plaintiff's experts was insufficient to defeat the summary judgment motion. App. 6.

Justice Cook dissented as to Defendant Chevron U.S.A., Inc. App. 6. The problem, as Justice Cook pointed out, is that Williams died before the suit was filed, thereby precluding his own direct testimony as to exposure. App. 7. This is in no way fatal to the cause, however, because, as Justice Cook explained, Plaintiff's burden can be satisfied with the testimony of coworkers

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[3] Even the Defendants were forced into significant – if reluctant – admissions in their brief to the Alabama Supreme Court as to Williams's exposure:

> The general testimony of the crewmember witnesses . . . arguably showed that the loading process created an environment in which ordinary seamen and able-bodied seamen would sometimes be exposed to cargo vapors, and the unloading process could also result in such exposures. . . . Also, such exposures could have occurred during tank cleaning and/or ballasting operations.

Defendants' Brief, pp. xii-xiii. *See also* p. 1 (implicitly admitting "intermittent exposures to petroleum products aboard certain ships on which [Matthew Williams] sailed"); p. 4 (admitting that "decedent . . . may have been intermittently exposed to vapors of gasoline, crude oil, jet fuel, and other petroleum products carried as cargo on the vessels on which he served"). "A court can appropriately treat statements in briefs as binding judicial admissions of fact." *Purgess v. Sharrock*, 33 F.3d 134, 144 (2d Cir. 1994).

as to Plaintiff's Decedent's exposure, whether that testimony provides circumstantial or direct evidence. App. 7. Justice Cook would have held that the evidence presented by Plaintiff was "clearly sufficient" to prove "substantial exposure to benzene." App. 8. The majority disagreed, however, and affirmed the dismissal of all the Defendants. App. 6.

Plaintiff Creighton Miller subsequently prepared the instant petition for a writ of certiorari.

REASONS FOR GRANTING THE WRIT

I. The Alabama Supreme Court Has Established a Precedent in that State that Is Contrary to this Court's Precedent on Jones Act Causation.

The Alabama Supreme Court has misapprehended the standard for Jones Act causation as set forth by this Court in *Sentilles v. Inter-Caribbean Corp.*, 361 U.S. 107 (1959), and its progeny in the federal courts, and it has effectively overruled its *own* precedent in *Sheffield v. Owens-Corning Fiberglass Corp.*, 595 So. 2d 443, 450 (Ala. 1992). Under the controlling standard of this Court, Plaintiff need only present evidence that allows one to reasonably infer exposure. The Alabama Supreme Court has now impermissibly raised the bar in its jurisdiction to require substantial evidence of substantial exposure. Jones Act seamen filing suit in Alabama will now be under a severe standard unknown in other jurisdictions that properly apply this Court's precedent.

II. The Causation Standard of *East River Steamship* and Its Progeny Govern Only Manufacturer-Defendants, Not the Shipowner-Defendants in this Case.

In *East River Steamship Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858 (1986), this Court held that concepts of products liability, based both on negligence and on strict liability, were firmly established as a part of the general maritime law. "Drawn from state and federal sources, the general maritime law is an amalgam of traditional common-law rules, modifications of those rules, and newly created rules." *Id.* at 864-65 (citing *Kermarac v. Compagnie Generale Transatlantique*, 358 U.S. 625, 630 (1959); *Romero v. International Terminal Operating Co.*, 358 U.S. 354 (1959)).

Following the *East River* rule, the Alabama Supreme Court held that in an admiralty toxic tort case against the manufacturers of asbestos, it would apply the Restatement (Second) of Torts § 431 as the "substantive standard[ ] of proof of causation." *Sheffield v. Owens-Corning Fiberglass Corp.*, 595 So. 2d 443, 450 (Ala. 1992). The court ruled that, in order to prevail, "the plaintiff must make it appear that it is more likely than not that the conduct of the defendant was a *substantial factor* in bringing about the harm." *Id.* (internal quotations omitted) (emphasis supplied).

III. The Alabama Supreme Court Failed to Apply the Jones Act's Liberal Causation Standard to the Shipowners; Instead, It Applied the Strict Causation Standard Applicable Only to Manufacturers.

The general maritime law notwithstanding, it is well-established that the role of the jury is significantly greater

in Jones Act and FELA[4] cases than in common-law negligence actions. The right of the jury to pass on questions of fault and causation must be most liberally viewed. Indeed, "trial by jury is part of the remedy." *Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines, Ltd.*, 369 U.S. 355, 360 (1962).

Under the Jones Act, the plaintiff's burden to prove causation is "very light" and has been described as "featherweight." *Ribitzki v. Canmar Reading & Bates, Ltd.*, 111 F.3d 658, 664 (9th Cir. 1997). If a shipowner breaches its duty to the seaman, the seaman must show only that the breach "played any part, even the slightest, in producing the injury or death for which damages are sought." *Ferguson v. Moore-McCormack Lines*, 352 U.S. 521, 523 (1957); *Miller v. American President Lines*, 989 F.2d 1450, 1463 (6th Cir. 1993). This standard of causation has been called the "producing cause" standard. *See, e.g, Alvarez v. J. Ray McDermott & Co.*, 674 F.2d 1037, 1042-43 (5th Cir. 1982).

In *Sentilles v. Inter-Caribbean Corp.*, 361 U.S. 107 (1959), this Court discussed what is necessary to establish medical causation under the Jones Act. In *Sentilles*, the Court reviewed the case of a seaman seeking damages under the Jones Act. As a result of rough seas, the plaintiff was pitched into the air and fell back onto the deck. Shortly thereafter, the plaintiff became ill, was hospitalized, and was treated for tuberculosis. The plaintiff's theory was that the accident aboard the ship activated or

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[4] The FELA is the "statutory Siamese twin of the Jones Act." *Bodden v. American Offshore, Inc.*, 681 F.2d 319, 326 n.25 (5th Cir. 1982).

aggravated a previously latent tubercular condition. Physical examinations and x-rays of the plaintiff taken two months before the accident revealed no appearance of tuberculosis. However, a tuberculosis specialist who reexamined the x-rays following the plaintiff's hospitalization concluded in retrospect that they did in fact reveal a pulmonary lesion. Questioned hypothetically regarding the effect of an accident like the plaintiff's on the aggravation or activation of a pre-existing, dormant tubercular condition, the specialist opined that acute dissemination of the tuberculosis "might" result from the accident. Another specialist posited the trauma and plaintiff's pre-existing diabetic condition as the most likely causes of the aggravation of the tuberculosis, though he was unable to state which of the two was more likely responsible. Another medical expert opined that the accident "probably aggravated" the plaintiff's condition, noting that "[w]e don't ever select one item and say that is the cause of any particular aggravation." *Sentilles*, 361 U.S. at 109.

The jury found that the accident had legally caused the injury. The court of appeals reversed. In reversing the court of appeals to preserve the jury determination regarding medical causation, the Court ruled that:

> The jury's power to draw the inference that the aggravation of petitioner's tubercular condition, evident so shortly after the accident, was in fact caused by that accident, was not impaired by the failure of any medical witness to testify that it was in fact the cause. Neither can it be impaired by the lack of medical unanimity as to the respective likelihood of the potential causes of the aggravation, or by the fact that other

> potential causes of the aggravation existed and were not conclusively negated by the proofs.

Sentilles, 361 U.S. at 109. The Court emphasized that, in cases involving issues of medical causation, it is not the function of the trial court to search the record for conflicting circumstantial evidence which supports alternative theories of causation, but rather the focal point of the judicial review in such cases is the "**reasonableness** of the particular inference or conclusion" drawn by the jury. *Id.* at 110 (emphasis added). The Court held that the proofs justified the conclusion of the jury that the accident caused the plaintiff's subsequent illness. *Id.*

It is important to note that *Sentilles* was decided under the *Frye* "general acceptance" standard for expert testimony, which is more strict than the current federal standard and is also the standard of the Alabama courts. Despite this more strict standard, the Court held that in a Jones Act case, members of the jury are "entitled to take all the circumstances, including the medical testimony, into consideration." *Sentilles*, 361 U.S. at 110.

The Alabama Supreme Court in the instant case has not given Plaintiff the benefit of this liberal standard. The court in its opinion conceded evidence sufficient under the Jones Act standard to withstand summary judgment.[5]

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[5] Petitioner believes that the court dismissed out-of-hand good circumstantial evidence of Williams's exposure. Justice Cook in his dissent agreed that the evidence was sufficient:

> In this case, Miller produced the testimony of Williams's coworkers. One of them specifically remembered seeing Williams working in proximity to benzene-containing products. Others remembered

The court wrote about the testimony of one of Williams's crewmates:

> [Robert] Alexander described himself as a friend of Williams, recalled seeing Williams on [the vessel *Gulfking*], recalled that the vessel carried aviation fuel, refined gasoline, and crude oil, and that the crewmembers were exposed to cargo vapors during loading and unloading.
>
> . . . .
>
> . . . Of all the witnesses, only Robert Alexander was able to place Williams on a vessel that was carrying a benzene-containing cargo that Williams might have been exposed to.

App. 3-4, 5. Having granted evidence of exposure, the question for the court was whether this evidence was legally sufficient to withstand summary judgment. Had the court properly applied the Jones Act's producing cause standard, it would have considered whether it would be reasonable for a jury to conclude that Williams's exposure to benzene "played any part, even the slightest, in producing the injury or death for which

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> what class of seaman Williams was and testified as to what his duties would have involved. There was extensive testimony indicating that these duties would have involved substantial exposure to benzene. This evidence is clearly sufficient under the above-cited authorities [which held circumstantial coworker testimony sufficient].

App. 8.

Petitioner does not ask this Court to review the erroneous weighing of evidence by the Alabama Supreme Court majority, however. On the contrary, the majority has conceded evidence sufficient to make this an issue of law, not of fact.

damages are sought." *Ferguson*, 352 U.S. at 523; *see also Sentilles*, 361 U.S. at 110 (holding that the inquiry is one of "reasonableness").

Instead, the court applied a test requiring "substantial evidence" of "substantial exposure." The court wrote:

> Justice Cook presumes . . . that there is **substantial evidence** indicating that Williams was exposed to benzene. However, we conclude that the evidence simply did not prove that Williams was **substantially exposed** to benzene.

App. 5-6. The court repeatedly used language of "substantiality." A requirement of substantiality is absolutely contrary on its face to the true "very light" and "featherweight" standard of the Jones Act. *Ribitzki v. Canmar Reading & Bates, Ltd.*, 111 F.3d 658, 664 (9th Cir. 1997).

Were the Defendants manufacturers, arguably this would be the proper test under *Sheffield*'s "substantial factor" test. But the Defendants in this case are **shipowners**, and the proper test is one of reasonableness per *Sentilles*, not substantiality. Ironically, the *Sheffield* court acknowledged that the standard of causation applicable to the shipowners under the Jones Act differs from the general maritime law standard applicable to manufacturers. *Sheffield*, 595 So. 2d at 450. Now, the Alabama Supreme Court has implicitly extended its holding in *Sheffield* to cover shipowner-defendants as well as manufacturers, but this holding is contrary to *this* Court's precedent on Jones Act causation.

IV. Because the Alabama Supreme Court Applied the Wrong Causation Standard, It Upheld an Improper Exclusion of Plaintiff's Expert Testimony.

After *Sentilles*, circuit courts recognized that the liberal causation standard of the Jones Act and FELA have an effect on admissibility. In *Hines v. Conrail Corp.*, 926 F.2d 262 (3d Cir. 1991), railway workers brought suit against Conrail, alleging injuries caused by exposure to polychlorinated biphenyls (PCBs). The district court granted summary judgment to Conrail without an accompanying opinion, and the Third Circuit, based on its opinion in *In re Paoli Railroad Yard PCB Litigation*, 916 F.2d 829 (3d Cir. 1990) (*Paoli I*), and upon its best estimation of why the district court ruled for defendant, reversed.

The court distinguished the situation in *Paoli I*, which arose under Pennsylvania tort law, from that of a FELA case, which has a "more lenient standard for determining negligence and causation." *Hines*, 926 F.2d at 267. Reviewing the Supreme Court FELA jurisprudence, the court opined "that there can be a jury question of causation 'when there is evidence that *any* employer negligence caused the harm, or, more precisely, enough to justify a jury's determination that employer negligence had played *any* role in producing the harm.' " *Id.* (quoting *Gallick v. Baltimore & O.R.R.*, 372 U.S. 108, 116 (1936)). Thus, the court concluded that "a trial court is justified in withdrawing issues from the jury's consideration only in those extremely rare instances where there is a zero probability either of employer negligence or that any such negligence contributed to the injury of an employee." *Id.* at 268.

The *Hines* court also ruled that causation under the FELA is broadly interpreted and that "a medical expert can testify that there was more than one potential cause of a plaintiff's condition." *Hines*, 926 F.2d at 268. Then, after discussing *Sentilles*, the court ruled:

> We agree with Hines that the standard [of causation] under FELA can significantly influence a determination of the admissibility of [the expert's] testimony. By enacting FELA, Congress desired to secure jury determinations in a larger proportion of cases than would be true of ordinary common law actions. Indeed, jury determinations were intended to be part of the FELA remedy.

Id. at 269 (citations and internal quotation marks omitted).

Applying its holding to the facts, the *Hines* court remanded the case for trial, even though: (1) Hines never handled PCB fluid directly; (2) He presented no evidence as to the concentration of PCBs on the track where he worked; (3) Hines's blood and body fat showed no higher concentrations of PCBs than in the public at large; and (4) Hines, a bladder cancer victim, had been a heavy smoker. *Hines*, 926 F.2d at 270-71. Thus, the FELA's liberal standard of causation required the admission of evidence that might well have been inadmissible in a non-FELA case.

Similarly relying on the rationale of *Sentilles*, the Court of Appeals for the Seventh Circuit affirmed a trial court's determination that a Jones Act seaman's medical expert had an adequate foundation for his testimony. *See Cella v. United States*, 998 F.2d 418 (7th Cir. 1993). "Although the complete etiology of all polymyositis has

not been definitely proven, the plaintiff's expert medical witness has testified that, based on his examination and testing of Cella, his review of Cella's full medical history, his research of medical literature, and his analysis of documented case studies of polymyositis, it is his opinion within a reasonable degree of medical certainty that trauma was the cause of this plaintiff's polymyositis." *Id.* at 429.

Other courts deciding FELA cases have followed suit. For example, in *Hose v. Chicago Northwestern Trans. Co.*, 70 F.3d 968 (8th Cir. 1996), the Eight Circuit held that, as a general rule, the factual basis of an expert's opinion goes to the credibility of the testimony, not the admissibility, and it is up to the opposing party to examine the factual basis of an opinion in cross-examination. The *Hose* court further ruled that "[o]nly if an expert's opinion is so fundamentally unsupported that it can offer no assistance to the jury must such testimony be excluded." *Id.* at 974.

Ultimately, the Alabama Supreme Court affirmed the trial court's ruling in the case at bar because it held that the expert testimony was insufficient to defeat summary judgment. The court held that the testimony did not have sufficient foundation in fact. The court held that the foundation was insufficient *because it applied the wrong causation standard*. The relevant passage of the opinion reads:

> The expert witnesses proffered by Miller all predicated their opinions upon the proposition that Williams had experienced substantial exposure to benzene over the course of his work on the various ships mentioned above. As we have already stated, the record contains no evidence

> of substantial exposure; therefore, the expert testimony offered by Miller is insufficient to defeat Chevron's summary-judgment motion.

App. 6. The Alabama court has required that expert medical testimony in a Jones Act case be supported by "substantial exposure." However, federal circuit courts of appeals, following this Court's lead in *Sentilles*, have held just the opposite: "Only if an expert's opinion is so **fundamentally unsupported** that it can offer no assistance to the jury must such testimony be excluded." *Hose*, 70 F.3d at 974 (emphasis added). "A trial court is justified in withdrawing issues from the jury's consideration only in those extremely rare instances where there is a **zero probability** either of employer negligence or that any such negligence contributed to the injury of an employee." *Hines*, 926 F.2d at 268 (emphasis added). Therefore, where the Alabama Supreme Court required "substantial" evidence, federal law actually requires that expert testimony be excluded only if it is "fundamentally unsupported" or the evidence offers "zero probability" of causation.

Applying the wrong standard, the Alabama court has excluded otherwise good expert testimony, thus denying Plaintiff a jury trial on the merits. Petitioner again notes that he believes that had the court well-considered the voluminous circumstantial evidence presented by coworkers of Williams's benzene exposure that this evidence would have satisfied even the erroneous substantiality standard. The *Hines* court, applying the proper standard, allowed plaintiff to proceed to a jury having presented less evidence of exposure than Plaintiff Miller in this case has. Additionally, even if there were no evidence at all from Williams's coworkers, the experts' independent

knowledge of the nature of tankers, their cargo, their crews, crew duties, the toxicity of benzene, and scientific literature discussing benzene exposure would have been sufficient to meet the proper Jones Act causation standard. Again, the *Hines* court allowed plaintiff to proceed to a jury even though plaintiff's expert had no evidence that Hines was directly exposed to PCBs and simply "assumed" that Hines was so exposed. *Hines*, 926 F.2d at 270. The expert's opinion was otherwise based on medical exams and records of the plaintiff plus "scientific articles and administrative findings on the toxicity of PCBs." *Id.* at 266-67. Plaintiff Miller presented just this sort of evidence and more in this case. Whether or not the Alabama court made an erroneous factual finding, however, does not change the fact that the Alabama court's holding is *legally* erroneous. The Alabama court has denied Plaintiff his proper remedy by fashioning a uniquely onerous standard of causation that this Court long ago rejected.

CONCLUSION

The Jones Act standard of causation is well-settled, if not well-understood in the Alabama courts. As Thomas Schoenbaum points out in his leading treatise on admiralty law, it can take a "close reading of the Supreme Court's jurisprudence" to discern that the "slight" standard discussed by this Court refers to the "reduced standard of causation in FELA and Jones Act cases." 1 T. Schoenbaum, *Admiralty and Maritime Law* § 6-22, at 320 (2d ed. 1994). The Alabama Supreme Court has failed to discern this rule and now has unwittingly set a contrary

rule for that state's Jones Act docket. This legal issue does not need further muddying; this ruling from Alabama's highest court will no doubt show up in litigation in other states as shipowner-defendants attempt to make hay with this erroneous ruling. To set the proper rule beyond contention, Petitioner urges this Court to issue a writ of certiorari to the Alabama Supreme Court and reverse the holding of that court in this case.

Respectfully submitted,

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Dated at Detroit, Michigan
this 8th day of June, 2000.

MAR 10 2000

NOTICE: This opinion is subject to formal revision before publication in the advance sheets of ***Southern Reporter.*** Readers are requested to notify the Reporter of Decisions, Alabama Appellate Courts, 300 Dexter Avenue, Montgomery, Alabama 36104-3741 ((334) 242-4621), of any typographical or other errors, in order that corrections may be made before the opinion is printed in ***Southern Reporter***.

SUPREME COURT OF ALABAMA

OCTOBER TERM, 1999-2000

1981819

Creighton E. Miller, as administrator of the estate of Matthew Williams, deceased

v.

National Bulk Carriers, Inc., et al.

Appeal from Mobile Circuit Court (CV-97-1038)

HOUSTON, Justice.

The plaintiff Creighton E. Miller, administrator of the estate of Matthew Williams, deceased, appeals from a summary judgment in favor of the defendants Arco Marine, Inc.; Atlantic Richfield Company ("Arco"); Unocal Corporation; National Bulk Carriers, Inc. ("N.B.C."); and Chevron USA, Inc. ("Chevron"), in a wrongful-death action. Williams died in 1994, at age 71, of aspiration pneumonitis secondary to multiple

myeloma. Williams had been a merchant mariner, and he had sailed primarily aboard tanker vessels from 1945 to 1981; Miller alleged that Williams had developed multiple myeloma as a consequence of shipboard exposure to benzene and benzene-containing products aboard ships owned by the defendants named above.[1] The defendants moved for a summary judgment, supporting their motion by deposition testimony indicating that Williams most likely had not had a sufficient exposure to benzene aboard any vessel owned by the defendants and that there is no general acceptance in any scientific field of the proposition that benzene exposure is associated with multiple myeloma in humans. Williams died before this action was filed, and no testimony or other record exists to indicate what exposures, if any, he experienced aboard vessels belonging to Arco Marine, Arco, Unocal, and N.B.C. Therefore, the trial court properly entered the summary judgment for those four defendants.[2]

Miller offered the following evidence in opposition to the summary-judgment motion insofar as it related to the defendant Chevron:

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[1] The plaintiff had voluntarily dismissed numerous other defendants before the court entered the summary judgment for those named above.

[2] An appellate court will affirm a trial court's judgment if it is right for any reason, even one not presented to or considered by the trial judge. *Premiere Chevrolet, Inc. v. Headrick*, [Ms. 1972001, November 12, 1999] ___ So.2d ___, ___ (Ala. 1999); *McKenzie Methane Corp. v. M-W Drilling, Inc.*, 653 So. 2d 982, 989 (Ala. 1995).

1) Williams served aboard the vessel *Gulfvictor* from November 26, 1956, to February 1, 1957, and Miller identified Rudolph Foreman as a person who could testify about Williams's exposures aboard that vessel. However, Foreman was discharged from the *Gulfvictor* on November 26, 1956, the date Williams boarded the ship; thus, they never served on the vessel together, and Foreman did not provide any evidence regarding any exposures Williams had to benzene aboard that vessel.

2) Williams served aboard the vessel *Gulfmills* in 1959 and 1960. Miller identified Israel Rangel as a witness who could describe Williams's exposures aboard that vessel. However, Rangel did not remember Williams, and he did not remember any cargoes that were aboard the vessel or where the vessel went during that time that could have exposed mariners to benzene or benzene-containing products. Therefore, Rangel was unable to identify any exposures that Williams had aboard the *Gulfmills*.

3) Williams served aboard the vessel *Gulfjaguar* in 1959, 1960, 1961, and 1962, and Miller identified Pete Sandifer, Isidore Thibeault, and Harvey Moss as witnesses who could describe Williams's exposure aboard that vessel. None of these witnesses was able to describe any exposures to benzene or benzene-containing products that Williams experienced aboard that vessel.

4) Williams served aboard the vessel *Gulfking* in 1963 and 1964, and Miller identified Robert Alexander as a witness who could describe Williams's exposures aboard that vessel. Alexander described himself as a friend of Williams, recalled seeing Williams on that vessel, recalled that the vessel carried aviation fuel, refined

gasoline, and crude oil, and that the crewmembers were exposed to cargo vapors during loading and unloading. He could not recall whether the tanks were cleaned on that vessel while he and Williams were aboard.

5) Williams served aboard the vessel *Gulfqueen* in 1964, and Miller identified Wilfred Lambier as a witness who could describe Williams's exposures aboard that vessel. Lambier did not recall Williams and could not describe any of Williams's exposures aboard that vessel.

6) Williams served aboard the vessel *Gulflion* on occasions between 1965 and 1981, and Miller identified Hercules Spicer, Henry Terrell, Joseph Hall, Chester Koczynski, and Augustine Martinez as witnesses who could describe Williams's exposures aboard that vessel. Spicer was aboard the *Gulflion* with Williams for one month in 1970, but he did not recall Williams or the cargoes carried by that vessel, and he could not testify as to what exposures, if any, Williams had aboard that vessel. Terrell was aboard the *Gulflion* with Williams between 1964 and 1974, but he did not recall Williams (the individual he had said he was thinking of was from Jacksonville, Florida, not from Alabama). Hall served with Williams for a month in 1974 and said he thought he knew him; however, the crewman he was thinking of was Caucasian and Williams was African-American, so Hall could not describe any exposures that Williams may have experienced on this vessel. Koczynski had no recollection of being on the *Gulflion* and no recollection of Williams. Accordingly, he could not describe any exposures that Williams had experienced. Martinez served with Williams aboard the *Gulflion* but offered no testimony in opposition to the defendants' motion for summary judgment.

The general testimony of crewmember witnesses, viewed in a light most favorable to Miller, the nonmovant, was that the loading process created an environment in which ordinary and able-bodied seamen would sometimes be exposed to cargo vapors, and that the unloading process could also result in such exposures, although to a lesser degree. Also, such exposures could have occurred during tank-cleaning and/or ballasting operations. However, the record contains no evidence indicating that Williams engaged in these activities. None of these activities occurred on a daily basis. The evidence indicates there was no significant exposure to cargo vapors aboard tankers of this type while they were underway at sea and that these vessels spent most of their time at sea.

In Justice Cook's dissent, he states his belief that the evidence set out above amounts to "extensive testimony indicating that [Williams's] duties would have involved substantial exposure to benzene." ___ So. 2d at ___. Of all of the witnesses, only Robert Alexander was able to place Williams on a vessel that was carrying a benzene-containing cargo that Williams might have been exposed to. Even in the situation described by Alexander, Williams would have been exposed, along with the rest of the vessel's crew, only during the loading and unloading of the cargo. As we pointed out earlier, the testimony offered by the plaintiff leaves open a number of gaps in the connection between Williams and any benzene exposure. Justice Cook's dissent presumes that those gaps are somehow filled, and, therefore, that there is substantial evidence

indicating that Williams was exposed to benzene. However, we conclude that the evidence simply did not prove that Williams was substantially exposed to benzene.

The expert witnesses proffered by Miller all predicated their opinions upon the proposition that Williams had experienced substantial exposure to benzene over the course of his work on the various ships mentioned above. As we have already stated, the record contains no evidence of substantial exposure; therefore, the expert testimony offered by Miller is insufficient to defeat Chevron's summary-judgment motion.

The summary judgment for Arco Marine, Arco, Unocal, N.B.C., and Chevron is affirmed.

AFFIRMED.

Hooper, C.J., and Maddox, See, Lyons, Brown, and England, JJ., concur.

Cook, J., concurs in part and dissents in part.

Johnstone, J., recuses himself.

COOK, Justice (concurring in part and dissenting in part).

The majority affirms a summary judgment entered in favor of Arco Marine, Inc., Atlantic Richfield Company, Unocal Corporation, National Bulk Carriers, Inc., and Chevron USA, Inc. ("Chevron"), against the plaintiff Miller in this wrongful-death action. I concur to affirm as to all but Chevron. As to the portion of the judgment involving Chevron's liability, I respectfully dissent.

The applicable law is, of course, maritime law. The theory of this case is that Williams, the plaintiff's decedent, was exposed to benzene while serving aboard certain ocean-going vessels, and, as a consequence of this exposure, "developed a cancer of the blood-forming organs known as multiple myeloma," from which he died. As to Chevron, I believe Miller presented substantial evidence indicating that Williams was exposed to benzene on Chevron's vessels.

The problem in this case is that Williams is dead; he cannot testify as to *what he did* as a seaman that would have exposed him to benzene. In toxic-tort cases, however, it is well established that a plaintiff may rely on the testimony of coworkers to establish his or her exposure to a defendant's products. See *Dillon v. Fibreboard Corp.*, 919 F.2d 1488 (10th Cir. 1990); *Johnson v. Celotex Corp.*, 899 F.2d 1281 (2d Cir.), *cert. denied*, 498 U.S. 920 (1990); *Martin v. American Petrofina, Inc.*, 779 F.2d 250 (5th Cir. 1985), *modified on other grounds*, 785 F.2d 543 (5th Cir. 1986); *Ward v. Celotex Corp.*, 479 So.2d 294, 296 (Fla. Dist. Ct. App. 1985) (plaintiff was "not an asbestos worker and had no knowledge of the products to which he was exposed"; therefore, it was "axiomatic that he [should be able to] rely upon the testimony of others to establish his exposures"); see also *Jackson v. Johns-Manville Sales Corp.*, 727 F.2d 506 (5th Cir. 1984). Moreover, in such cases it is unnecessary that coworkers *know* or *remember* the plaintiff. *Roehling v. National Gypsum Co. Gold Bond Bldg. Prods.*, 786 F.2d 1225, 1228 (4th Cir. 1986).

An instructive case from Alabama is *Sheffield v. Owens-Corning Fiberglass Corp.*, 595 So.2d 443 (Ala. 1992), an action by former seamen against the owners of ocean-

going vessels on which they had served. The problem confronting the seamen in *Sheffield* was in identifying " 'the injury-causing product and its manufacturer.' " *Id.* at 450. This Court held that the threshold identification requirement could be met by circumstantial evidence. *Id.* In particular, it held that one of the seamen, William Shaw, had met his burden of proving exposure to " 'Kaylo,' an asbestos-containing insulation material manufactured by [Owens-Corning Fiberglass Corporation]." *Id.* at 451, 455-56. The identification evidence was presented by Shaw himself, who remembered seeing Kaylo on board some of the ships on which he had served. *Id.* The exposure evidence was supplied by, among others, a contractor, who "described the conditions *typically created* by the shipboard installation and repair of [Kaylo]," *id.* at 455 (emphasis added); and by Shaw, who testified that he was often in "close" proximity to "those who worked with Kaylo insulation on pipes and boilers." *Id.* at 456.

In this case, Miller produced the testimony of Williams's coworkers. One of them specifically remembered seeing Williams working in proximity to benzene-containing products. Others remembered what class of seaman Williams was and testified as to what his duties would have involved. There was extensive testimony indicating that these duties would have involved substantial exposure to benzene. This evidence is clearly sufficient under the above-cited authorities.

The trial judge also disallowed the testimony of *all* of Miller's expert witnesses, who testified that exposure to benzene can cause myeloma. The trial court apparently concluded that their testimony would not satisfy the standard of *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923).

The trial court improperly focused, however, on the *conclusions* of those experts, rather than on the *methodology* on which those conclusions were based. In that respect, Frye is essentially a nonissue. As to Chevron, the summary judgment should be reversed and the case remanded. As to the disposition of Miller's claims against Chevron, therefore, I respectfully dissent.

IN THE CIRCUIT COURT OF
MOBILE COUNTY, ALABAMA

CREIGHTON E. MILLER, Administrator of the Estate of MATTHEW WILLIAMS, DECEASED (D.O.D. 03/30/94), Plaintiff,	§	CIVIL ACTION NO. CV-97-001038
vs.	§	
ARCO MARINE, INC., et al., Defendants.	§	

ORDER

On June 4, 1999, this Court granted Defendants' Motion for Summary Judgment, finding that plaintiff had failed to present substantial evidence that decedent experienced significant exposure to benzene, and that plaintiff had not produced any admissible evidence that the alleged association between benzene exposure and multiple myeloma has been generally accepted in any relevant scientific field.

During the course of the hearing on the Motion for Summary Judgment, the Court excluded the expert testimony offered by plaintiff in opposition to Defendants' Motion for Summary Judgment. The testimony of plaintiff's experts Dr. Vernon E. Rose, Dr. Peter F. Infante, Dr. Myron A. Mehlman and Dr. Frank H. Gardner was inadmissible because, among other things, each of those witnesses relied upon unproved assumptions of fact as to decedent's benzene exposure, and none could offer any substantial evidence that the benzene exposure/multiple

myeloma association is or ever has been generally accepted in any scientific field. The testimony was inadmissible in this case for the same reasons that the Court excluded the testimony of such expert witnesses proffered by the same plaintiff in *Creighton E. Miller, Administrator of the Estate of Jabe J. Fincher, Sr., Deceased v. Keystone Tankship Corporation, et al.*, Case No. 94-3907 (Order of May 7, 1999).

It has come to the attention of the Court that the Court record does not reflect the Court's Order excluding the testimony of plaintiff's expert witnesses, since the hearing was not reported or recorded. So that the record will be clear, the Court hereby orders the Clerk of the Court to supplement the Record on Appeal with this Order clarifying the Court's rulings with regard to Defendants' Motion for Summary Judgment.

DONE this 20th day of August, 1999.

/s/ Edward B. McDermott
CIRCUIT JUDGE

(2)

No. 99-1979

Supreme Court, U.S.
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JUN 28 2000
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In The

Supreme Court of the United States

CREIGHTON E. MILLER, Administrator of the Estate of Matthew Williams, Deceased,

Petitioner,

v.

ARCO MARINE, INC.; ATLANTIC RICHFIELD COMPANY; CHEVRON U.S.A., INC.; UNOCAL CORPORATION and NATIONAL BULK CARRIERS, INC.,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of Alabama

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12 pp

CORPORATE DISCLOSURE STATEMENT

There is no parent or publically held corporation owning more than 10% of the stock of any of the Respondent corporations. The Ludwig Group, Inc., provides management and administration services to National Bulk Carriers, Inc. The stock of National Bulk Carriers, Inc. has never been publically held and is presently held by two foundations: Virginia and D.K. Ludwig Fund for Cancer Research and The Virginia and D.K. Ludwig Fund for Cancer Research, Inter Vivos.

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REASONS FOR DENYING THE WRIT

Petitioner has misperceived the substance of the decision by the Supreme Court of Alabama, and has relied upon that misperception in contending that there is a federal question worthy of review by this Court. In fact, the decision of the trial court as approved by the Supreme Court of Alabama was based upon the insufficiency of evidence offered by plaintiff to create a material issue of disputed fact regarding decedent's exposure to benzene, and did not involve any interpretation or application of any federal statute or other rule of federal substantive law.[1] Because there is no federal question implicated in the decision of the Supreme Court of Alabama, Petitioner's effort to invoke the jurisdiction of this Court is misguided. Even if jurisdiction lay in this Court to review the underlying decision, this Court should nevertheless deny the petition because the case was decided correctly under state law without impinging Petitioner's federal rights and because, in any event, this Court should not grant certiorari simply to review evidence and/or discuss specific facts.

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[1] Petitioner has never offered any evidence that decedent was exposed to benzene or any benzene-containing products aboard any vessels owned, operated, or controlled by Respondents Unocal Corporation, Arco Marine, Inc., Atlantic Richfield Company and National Bulk Carriers, Inc. The only Respondent against whom Petitioner offered any evidence in opposition to the summary judgment motion is Chevron U.S.A., Inc., formerly known as Gulf Oil Corporation.

I. PETITIONER HAS NOT IDENTIFIED ANY COMPELLING REASON FOR THIS COURT TO EXERCISE ITS DISCRETION TO REVIEW THIS CASE.

Petitioner has failed to state or identify a compelling reason for granting this writ of certiorari, as required by Supreme Court Rule 10. Moreover, Petitioner has made no showing that the decision of the Supreme Court of Alabama is in conflict with the decision of another state court of last resort or of a United States court of appeals. Additionally, Petitioner has made no showing that this case involves an important unsettled question of federal law or that the Supreme Court of Alabama decided an important federal question in a way that conflicts with relevant decisions of this Court. To the contrary, it appears that Petitioner here simply seeks review of alleged erroneous factual findings or misapplication of properly stated law, the very type of review "rarely granted" under the strictures of Supreme Court Rule 10.

II. THIS CASE IS NOT OF A NATURE APPROPRIATE FOR REVIEW BY THIS COURT.

Respondents cannot improve on what was said by Justices Stewart and Frankfurter in *Sentilles v. Inter-Caribbean Shipping Corp.*, 361 U.S. 107 (1959), the case upon which Petitioner primarily relies in seeking review. Justice Stewart, recognizing that the case presented only a sufficiency of the evidence issue, stated:

> Cases like this, I am fairly convinced, do not belong in this Court. To review individualized personal injury cases, in which the sole issue is the sufficiency of the evidence, seems to me not

> only to disregard the Court's proper function, but also to deflect the Court's energies from the mass of important and difficult business properly here.

Sentilles, 361 U.S. at 111 (Stewart, J., concurring). Justice Frankfurter agreed, stating: " 'We do not grant a certiorari to review evidence and discuss specific facts.' " *Sentilles*, 361 U.S. at 111 (Frankfurter, J., dissenting), quoting from Justice Holmes in *United States v. Johnston*, 268 U.S. 220, 227 (1924). Justice Frankfurter went on to observe: "As a general practice the Court does not review cases involving merely individualized circumstances not unlike the type of factual situations arising in the application of the Federal Employers' Liability Act and the Jones Act." *Sentilles*, 361 U.S. at 113 (Frankfurter, J., dissenting).

These statements apply equally to the individualized circumstances and factual situations arising out of this Jones Act case.

III. THE DECISION OF THE SUPREME COURT OF ALABAMA DOES NOT RAISE THE QUESTION PRESENTED BY THE PETITION.

The case below, as it relates to Petitioner's Jones Act claim, involved two basic questions: (1) Whether Petitioner had offered sufficient admissible evidence of exposure to benzene to create a material issue of disputed fact,[2] and (2) Whether the expert testimony offered by

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[2] The benzene exposure issue was material and fundamental to the issue whether Respondents provided decedent with a safe place to work, a primary element of Petitioner's Jones Act claim.

Petitioner in opposition to Respondents' Motions for Summary Judgment was admissible. The Supreme Court of Alabama answered both of these questions in the negative, and concluded that the trial court had therefore acted properly in granting Respondents' Motions for Summary Judgment.

Conversely, the question presented in this Court by Petitioner focuses on an alleged application of "a strict common-law causation standard to medical evidence." Pet. i. In fact, no issue of medical causation was ever addressed by either the Supreme Court of Alabama or the trial court, because the courts found that Petitioner failed to offer sufficient admissible evidence of exposure to benzene to create a material issue of disputed fact.

The Supreme Court of Alabama held, in no uncertain terms, that Petitioner did not offer sufficient evidence of exposure to benzene to create a material issue of disputed fact. App. 6. Petitioner's assertion to the contrary notwithstanding, the court below therefore never reached the next question – whether benzene exposure did cause or could have caused decedent's multiple myeloma. That holding was proper in all respects and does not merit review by this Court.

The courts below held that Petitioner's exposure evidence only consisted of potential or possible shipboard exposure to benzene at some unknown concentration for an unknown duration aboard some of Respondent Chevron/Gulf's vessels. The trial court held that such evidence was not sufficient in this particular case to form the factual basis to support a finding of an unsafe workplace under the Jones Act or to form the factual basis for the

opinions offered by Petitioner's expert witnesses. Therefore, the Supreme Court of Alabama, in affirming, held that (1) Petitioner's evidence did not create a material issue of disputed fact; and (2) Petitioner's evidence was insufficient to defeat Respondents' summary judgment motions.

IV. THE PETITIONER HAS MISSTATED THE CONTROLLING STANDARD FOR JONES ACT CASES AND NO FEDERAL QUESTION IS IMPLICATED.

The Petitioner argues, without citation, that "[u]nder the controlling standard of this Court, Petitioner need only present evidence that allows one to reasonably infer exposure." In Petitioner's apparent view, evidence that his decedent might have been exposed to some unquantified concentration of benzene at some time in the past would, without regard to how much exposure, for how long, over what period of time, with regard to any shipboard exposure aboard some of Respondent Chevron/Gulf's vessels, be sufficient to permit a jury to infer that such exposure created an unsafe place to work and caused him to develop multiple myeloma.

That certainly wasn't the import of this Court's decision in *Sentilles v. Inter-Caribbean Corp.*, 361 U.S. 107 (1959), the decision on which Petitioner so strongly relies. To the contrary, *Sentilles* involved a proven discrete exposure and presented only the question of whether the seaman's subsequent illness was causally related to that exposure. Here, on the other hand, Petitioner had the opportunity in the trial court to offer the requisite evidence of exposure to benzene, and he failed to do so. He

could have conducted air sampling on the vessels on which decedent served to assess the benzene concentrations thereon, but he did not do so. He could have conducted air sampling on vessels similar to those on which decedent served to assess the same thing, but he did not do so. He could have biologically monitored seamen serving under the same or similar conditions as those experienced by the decedent, to try to characterize what benzene exposure decedent might have experienced, if any, but he did not do so. He could have relied upon data available in the scientific literature to estimate exposure, but he did not do so. Instead, he sought to fulfill his burden of offering the requisite evidence of benzene exposure by relying upon non-specific recollections of other crewmembers who had served upon various vessels either with the decedent or around the time that the decedent served on such vessels.[3] Such evidence, after being evaluated by the trial court, was found to be insufficient to create a disputed issue of material fact regarding decedent's benzene exposure. Clearly, the facts of this case are substantially different from those presented in *Sentilles*.

Petitioner has not pointed this Court to any Jones Act decision that permits such an abdication of the burden of proof. Whether Petitioner was entitled to the benefit of a relaxed causation standard in attempting to demonstrate

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[3] Again, Petitioner offered no evidence of exposure as to Respondents Unocal Corporation, Arco Marine, Inc., Atlantic Richfield Company and National Bulk Carriers, Inc. Accordingly, there is no basis on which Petitioner can assert an appeal against these Respondents.

that a medical causal relationship existed between the disease that decedent suffered and his shipboard exposures, as Petitioner suggests, was actually not an issue in the trial court or the Supreme Court of Alabama. Rather, the issue was Petitioner's failure to discharge his obligation to first demonstrate by the requisite evidence that decedent in fact experienced such shipboard exposures and at such concentrations and for such durations that an unsafe workplace was created. As noted above, after evaluation of the evidence, the trial court found such evidence lacking, and the Supreme Court of Alabama agreed. Moreover, Petitioner was not entitled, as he seems to assume that he was entitled, to equate possible exposure with an unsafe workplace or with medical causation. Failure to offer the requisite evidence of exposure is fatal to each element of Petitioner's cause of action, and nothing in the Jones Act relaxes that obligation to any extent. To the contrary, even under the Jones Act, a plaintiff must, at the very least, offer evidence sufficient to create a material issue of disputed fact, and in this case, Petitioner utterly failed to do so.

CONCLUSION

For all of the foregoing reasons, Respondents respectfully request that this Honorable Court deny the Petition.

Respectfully submitted,

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No. 99-1979

In The

Supreme Court of the United States

CREIGHTON E. MILLER, Administrator of the Estate of Matthew Williams, Deceased,

Petitioner,

v.

ARCO MARINE, INC.; ATLANTIC RICHFIELD COMPANY; CHEVRON U.S.A., INC.; UNOCAL CORPORATION; NATIONAL BULK CARRIERS, INC.,

Respondents.

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Reply Brief of Petitioner Miller

Now comes Creighton E. Miller, Administrator of the Estate of Matthew Williams, and presents his reply to the brief filed by Respondents in opposition to his petition. Respondents make three basic arguments in opposition to the petition for certiorari.

I. There *Is* a Federal Question at Issue

Respondents argue that there is no federal question in this case, and that therefore this Court does not have jurisdiction to hear this case. Respondents make no attempt to substantiate this assertion, claiming without reference to any portion of the opinion that the Alabama Supreme Court decided the case using state law. In fact, this contention is belied by Respondents' admission that the Alabama courts decided this issue based on federal law: Respondents admit that the trial court held that Petitioner's evidence was not sufficient *"under the Jones Act."* Respondents' Brief, p. 4. As Justice Cook wrote in his dissent to the Alabama majority, "The applicable law is, of course, maritime law." App. 7.

This case is governed by the Jones Act. It is black-letter law that while state courts have concurrent jurisdiction over maritime claims, a state court must apply substantive federal maritime law, and not state law. *Offshore Logistics, Inc. v. Tallentire,* 477 U.S. 207, 222 (1986). Petitioner submits that he has shown that the Alabama Supreme Court has misinterpreted this Court's precedent on Jones Act causation, and the federal question is apparent.

II. The Issue Is Causation, and Respondents Know It

Respondents argue that the Alabama Supreme Court ruled only on the sufficiency of the factual evidence and did not reach the legal issue of causation. The relevant question is, "Sufficient evidence *for what purpose*?" Respondents claim that there was not sufficient evidence to create a material issue of disputed fact, but cite to a page of the Alabama Supreme Court's opinion that offers no support for this contention. In truth, the holding of the Alabama court does go to the legal issue of causation.

What the Alabama Supreme Court held is that Petitioner did not submit substantial evidence of substantial exposure to benzene. There is no legal or logical reason to require a substantiality standard unless the court was making a legal determination that exposure to lower levels of benzene is not sufficient to present a jury question on proximate causation. The Alabama Supreme Court's requirement of **substantial** exposure is a legal conclusion that anything less than substantial exposure cannot legally cause injury.

Respondents thankfully illuminate the issue well in their brief: "[T]he issue was Petitioner's failure to discharge his obligation to first demonstrate by the requisite evidence that decedent in fact experienced such shipboard exposures and at such concentrations and for such durations *that an unsafe workplace was created.*" Respondents' Brief, p. 7. Why would a workplace be unsafe? Because working there can cause cancer. Respondents agree that the evidence is only insufficient if one holds that it is not enough to prove causation. Likewise, Respondents state that Petitioner did not submit evidence

"sufficient to permit a jury to infer that such exposure created an unsafe place to work and *caused him to develop multiple myeloma.*" Respondents' Brief, p. 5. Respondents are conflicted: while arguing that the issue is not causation, they cannot help but let a Freudian slip of legal truth into their brief, admitting that the alleged insufficiency goes to the causation element.

Hedging their bets in the event that the issue is causation, Respondents try to distinguish *Sentilles v. Inter-Caribbean Corp.*, 361 U.S. 107 (1959), from Mr. Williams's case. They point out that *Sentilles* concerned a "proven discrete exposure" [actually, the case involved an accident, not a toxic exposure], unlike the long-term exposure at issue in our case. This is not a relevant distinction, however. The Alabama Supreme Court acknowledged that Williams was exposed to benzene. Having granted this evidence, the case parallels *Sentilles*:

> ***Sentilles*:** Given accident X, could X have caused Petitioner's injury?
>
> **Our Case:** Given exposure, could this exposure cause Petitioner's injury?

Sentilles held that even in the face of weak and contradictory medical testimony, the jury may reasonably infer causation. As shown above, the Alabama court's substantiality requirement is a causation issue, and therefore *Sentilles* controls, giving Williams the benefit of a more liberal standard than the Alabama Supreme Court required. The Alabama Supreme Court has precluded jury deliberation on the causation issue because it held that the jury may not make a reasonable inference, rather

it must rely on substantial evidence of substantial exposure. Petitioner has evidence of exposure, and the Alabama court acknowledged it. What the Alabama court demands is more evidence to show causation than is required under the Jones Act. This is not the reasonable inference standard of *Sentilles*.

III. Petitioner Does Not Ask for a Factual Review; Petitioner Requests that this Court Prevent the Alabama Supreme Court from Writing Its Own Burdensome Causation Standard

Respondents try to pigeonhole this case as factual and not legal, and they quote from the concurrence and dissent to *Sentilles* that such factual review issues are inappropriate for this Honorable Court to hear. Petitioner agrees that such cases are inappropriate, but Petitioner has tried to make clear that he is not seeking a factual review. Instead, he asks that this Court consider whether the Alabama Supreme Court has placed a higher legal burden on him than the Jones Act and this Court require. The correct standard is very relaxed, and requires only evidence from which a jury may infer exposure and causation.[1] Respondents state that "petitioner was not

---

[1] Respondents state that Petitioner argues "without citation" that a Petitioner need only present evidence from which a jury may reasonably infer exposure. Contrary to Respondents' claim, this statement is supported in the petition, and Petitioner repeats the citation here to avoid any further misunderstandings on the part of Respondents: *Sentilles*, 361 U.S. at 110 (holding that the focal point of judicial review on causation issues is the "reasonableness of the particular inference or conclusion."). Petitioner has the correct standard.

entitled . . . to equate possible exposure with an unsafe workplace or with medical causation." Respondents' Brief, p. 7. Petitioner asks for no special treatment; he simply wants to have his case heard by a court applying the proper legal standard so that he may have his case heard by an impartial jury. Petitioner is prepared to allow a jury to decide whether his exposure to benzene was the cause of his cancer.

Respondents argue further that Petitioner did not present evidence of air sampling and biological monitoring. Petitioner does not want to waste this Court's time with irrelevant factual arguments but will briefly reply in order to dispel the prejudicial effects of this argument. In these maritime benzene exposure cases there will be no testimony presented that on such-and-such a date, a witness stood next to the now deceased mariner with a sophisticated measuring device and recorded a precise level of benzene exposure for an exact length of time. No such evidence will be presented because it does not exist. Such testimony never exists in any toxic exposure case based upon workplace exposure over many years. To hold that such precision is required is to hold that a toxic-tort Petitioner can never recover.[2] What has been presented,

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[2] *See Ferebee v. Chevron Chemical Co.*, 736 F.2d 1529, 1535-36 (D. C. Cir. 1984) ("In a courtroom, the test for allowing a Petitioner to recover in a tort suit of this type is not scientific certainty but legal sufficiency . . . "). Petitioner must ask whether this Court believes that Respondents would have considered air sampling or other tests on their tankers twenty to fifty years after Mr. Williams sailed aboard these tankers as valid evidence of their liability. Petitioner is better off with solid circumstantial evidence than the sort of tests Respondents suggest.

literally in *volumes*, is classic worksite testimony by persons who worked with or near the deceased, on the same vessels, during the same periods of time. This is legally sufficient circumstantial evidence of Williams's exposure. This Court has underscored the propriety of circumstantial evidence in maritime tort cases. In *Michalic v. Cleveland Tankers, Inc.*, 364 U.S. 325, 330 (1960), a Jones Act case, the Court states that "direct evidence of a fact is not required. Circumstantial evidence is not only sufficient, but may also be more certain, satisfying and persuasive than direct evidence." Respondents may want to argue facts to this Court, but Petitioner wants to argue the law.

IV. Conclusion

Petitioner does not ask this Court to review the facts of his case. In fact, Petitioner has submitted very little of the evidence that he presented to the Alabama courts. This Court does not need a deep factual knowledge of the case to recognize that the Alabama Supreme Court has muffed the Jones Act causation standard. The causation standard is **liberal**. A substantiality standard is anything but liberal. Petitioner asks that this Court not allow erroneous Alabama precedent to compromise the federal

rights of thousands of litigant seamen in that state and throughout the country.

Respectfully submitted,

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this 22nd day of September, 2000.